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In the
Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-334.

NORMAN DANSKER, STEVEN HAYMES AND
DONALD ORENSTEIN,
PETITIONERS,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Reply to Brief for the United States in Opposition.

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The government's brief in opposition (hereinafter "Opp.") implicitly concedes the two major contentions raised by the IFC defendants in their petition (No. 76-334): (a) that the court of appeals' affirmance of the remaining substantive count charging the bribery of Mayor Ross (count II) is inconsistent with that court's reversal of the umbrella conspiracy

count (count I) (Opp. 8); and (b) that the jury's conviction of the IFC defendants under count II must be presumed to have been based on the trial court's instruction that if the jury found the IFC defendants guilty of conspiracy under count I, it could convict those defendant's under count II solely on the basis of their vicarious liability for the acts of their co-conspirators Sutton and Diaco, without believing any evidence that the IFC defendants participated personally in or even knew about the bribery of Ross (Opp. 10). In light of these two critical concessions, the government is forced into the uncomfortable posture of arguing: (a) that the inconsistency between the lower court's affirmance of the count II bribery charge and its reversal of the count I conspiracy charge does not require reversal of count II because "the court of appeals erred . . . in vacating the conspiracy-count and remanding it for a new trial" (Opp. 8); and (b) that the IFC defendants were properly held criminally responsible for the Ross bribery even if their convictions under count II rested solely on a theory of vicarious liability derived from their involvement in the non-criminal Serota scheme. As will be demonstrated below, both of these arguments are self-defeating and require reversal of the remaining Ross bribery count; or, at the least, they require a remand to the court of appeals for reconsideration of its judgment in light of the dramatic new shift in the government's legal position.

(a) The government's first argument — that the inconsistency between the affirmance of count II and the reversal of count I does not require reversal of count II because it is based upon "an erroneous overturning" of count I (Opp. 8) — is premised on an absurd twisting of logic. The government concedes, as it must, that since "[n]o petition for a writ of certiorari to review that aspect of the judgment [overturning count I] has been filed by the government . . .," "the judgment of the court of appeals vacating the conspiracy convic-

tion can[not] be disturbed." Opp. 8, n. 3. Nor does the government dispute that the court of appeals' reversal of count I was predicated on that court's express conclusion that it was entirely possible, on the record of this case, "that the jury found that the defendants engaged in a conspiracy to bribe Serota *alone* in spite of its guilty verdict on Count II" (App. 17a; emphasis added). Indeed, the government specifically acknowledges that the lower court, in vacating and remanding the conspiracy count, considered but "*rejected* the government's argument that the jury's conviction of the defendants on both substantive counts necessarily showed that the jury found a conspiracy to bribe Ross." Opp. 6 (emphasis added).

Recognizing that the court of appeals' decision in vacating count I was premised on its determination that the jury must be presumed to have found *no* participation whatsoever by the IFC defendants in a conspiracy to bribe Ross, the government must face and answer the fundamental argument advanced by the IFC defendants. That argument, simply put, is that pursuant to the trial court's vicarious-liability instruction, the jury must be presumed to have convicted the IFC defendants of bribing Mayor Ross under count II *solely* by first finding these defendants guilty of conspiracy with Sutton and Diaco under count I (based on their conspiring to bribe Serota) and then imputing to the IFC defendants the corroborated and undisputed attempts by "co-conspirators" Sutton and Diaco to bribe Ross.

Because this result flows inexorably from the court of appeals' decision on count I — a decision which concededly "can[not] be disturbed" — the government is forced to concede that that court's reversal of the conspiracy count is inconsistent and cannot be reconciled with its affirmance of the remaining substantive count. Opp. 8. Yet by virtue of this concession, the government is faced with a Hobson's choice: either it must further concede that the reversal of

count I necessarily requires reversal of count II, or it must attempt to *defend* the lower court's affirmance of count II by *attacking* its reversal on count I. Plainly unwilling to make the first choice, which would concede the correctness of the IFC position, the government chooses to contradict its own express acknowledgement that the lower court's decision on count I "can[not] be disturbed" and to present the very argument which it concedes it may *not* properly present — namely, that count I was "erroneous[ly] overturned." Opp. 8.

Obviously uncomfortable with this twisted position, the government ultimately argues that this Court should deny review because the claimed inconsistency does "not present any general issue warranting review by this Court" (Opp. 8). The Government takes this position despite its implicit acknowledgement that the combined effect of the court of appeals' decision coupled with the government's concession of inconsistency is that the conviction of the IFC defendants on count II may be based solely on their innocent involvement in the noncriminal Serota scheme. This is an unconscionable position for the government to take. This Court, under its supervisory power, should not accede to a government request to leave standing a conviction which the government cannot logically defend in the face of a court of appeals decision that it may not legally challenge.[1]

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[1] The government's argument that since "inconsistency" between counts is not generally a basis for reversal of a *jury* verdict, "there is no reason for a different result when the decision of a court of appeals creates an inconsistent verdict" (Opp. 8), is historically and logically inaccurate and ignores the very different and critical functions of the jury and the reviewing court: while traditionally the jury is entitled to rely on its own vagaries of human thinking in determining guilt or innocence, the reviewing court is specifically endowed with the duty and obligation to apply reason and logical thinking to the facts and the law and to ensure that guilty verdicts are indeed *consistent* with principles of logic and law.

Moreover, as elaborated in the petition of the IFC defendants (Pet. 76-334, at 14-16 and 30-32), the issue at stake here — the issue of what guidelines the courts of appeals should apply in determining whether to reverse or sustain a substantive count when the umbrella conspiracy count under which it was tried is itself reversed on appeal — is indeed "a general issue warranting review by this Court"; it is, in fact, an important and increasingly recurring issue in the federal courts. The record of this case — which has been even further sharpened by the government's concessions before this Court — presents an ideal vehicle for clarifying the confused and critical area of federal appellate law dealing with this issue.[2]

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[2] The government attempts to dispose of the IFC defendants' claim that the issue at stake here transcends the particulars of this case by arguing (1) that the verdict on count II should not be disturbed because "the jury must have believed Sutton's direct evidence or it would not have convicted the IFC defendants . . . on both substantive counts" (Opp. 9); and (2) that in any event the IFC defendants' petition merely raises "contentions as to whether the jury . . . might have disbelieved admissible evidence [i.e., Sutton's testimony] directly supporting its verdict. . . ." Opp. 9. Both of these arguments, however, are belied by the record of this case.

First, as has been amply demonstrated (Pet. 76-334, at 8-9 and 18-19), in light of the undisputed tape-recorded evidence against Sutton and Diaco on count II, the lack of any such evidence against the IFC defendants under that count, and the trial court's instruction on vicarious liability which the jury must be presumed to have obeyed, it simply *cannot* be argued that "the jury *must* have believed Sutton's direct evidence or it would not have convicted the IFC defendants" on count II. Indeed, given the attack on Sutton's credibility, the possibility that the jury convicted the IFC defendants on count II without relying on Sutton's direct testimony is highly likely. See fuller discussion on this point in Pet. 76-334, at 18. (As to count III, as previously noted in Pet. 76-334, at 18, n. 11, the jury's conviction on that substantive count is also entirely consistent with a rejection of Sutton's testimony since there was ample documentary evidence establishing Serota's agreement to accept money and Sutton's testimony added nothing essential.)

Second, the government's derogation of the IFC position to one which does no more than raise "contentions as to whether the jury . . . might have dis-

(b) The government's second argument — that the IFC defendants were properly convicted under count II even if their convictions under that court were based solely on the jury's finding that the IFC defendants engaged in a non-criminal joint venture to purchase Serota's apartment (Opp. 9-11) — is so absurd that it falls of its own weight. The fundamental contention raised by the IFC defendants' petition is that under the trial judge's conspiracy instruction it must be presumed that

> "the convictions of the IFC defendants on Count II rested entirely on the theory of vicarious liability for the acts of alleged co-conspirators, and not at all on the individual determination of their guilt. Under this theory — which the jury was instructed to apply — the jury must be presumed to have convicted the IFC defendants of bribing Mayor Ross *solely by imputing to these defendants* the corroborated and undisputed attempts by 'co-conspirators' Sutton and Diaco to bribe Ross." (Pet. 76-334, at 17-18; emphasis in original.)

Significantly, the government nowhere disputes that this may indeed be what happened. See Opp. 9-10. Nor could it dispute this possibility since the government itself argues, in a related context, that "it must be presumed that the jury

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believed admissible evidence . . ." wholly mischaracterizes the IFC defendants' petition. As the IFC petitioners make perfectly clear (see Pet. 76-334, at 16, 30-31), their discussion of the evidence in this case is not intended to persuade this Court to substitute its judgment for that of the jury; rather, it is designed to demonstrate that this case constitutes a paradigmatic display of the three kinds of prejudice which may result from a joint trial of substantive conspiracy counts under an erroneous conspiracy theory which is later invalidated by the court of appeals. It is precisely because of the paradigmatic prejudice involved in this case — and not because the jury "might have disbelieved admissible evidence" — that the IFC defendants submit that this case warrants review by this Court.

obeyed" the trial court's instructions with respect to the liability of co-conspirators. Opp. 11. The government argues, however — incredible as this may seem — that the jury acted *properly* in holding that IFC defendants criminally responsible for the criminal acts of Sutton and Diaco, even if the underlying agreement between the IFC defendants and Sutton and Diaco was *not a criminal conspiracy*. Opp. 10. In support of this truly preposterous and unprecedented argument, the government invokes "basic principles of agency," which it thoroughly misunderstands and bizarrely misapplies to the facts of this case.

The government's "agency" argument comes down to a claim that simply because the IFC defendants joined with Sutton and Diaco in a "joint venture to obtain variances" — even though that "joint venture" was entirely legal — the IFC defendants must be criminally responsible for the unagreed-to illegal acts engaged in by their co-venturers Sutton and Diaco. When spelled out, the government's application of "agency" principles would hold the IFC defendants criminally liable for Sutton and Diaco's attempt to bribe Mayor Ross under the following circumstances: three businessmen (the IFC defendants) get together with two other persons (Diaco and Sutton) in an effort to secure certain zoning variances (an entirely legal and constitutionally protected activity); the three businessmen — after extensive consultation with eminent counsel[3] — agree with the two others to employ an entirely non-criminal and constitutionally protected means to achieve their joint goal, namely, to purchase, at an inflated price, the apartment of a private citizen who publicly opposes the variances (Serota), for the purpose of obtaining that citizen's agreement to terminate his public opposition to the variances.

[3] Serota did, in fact, receive an opinion letter from one of the most eminent law firms in New York City indicating that the transaction was entirely lawful.

Entirely unbeknownst to the three businessmen, the other two persons decide to offer an illegal bribe to a public official (Mayor Ross) in order to improve the prospects of securing the variances. The government argues that under the above set of facts, the three businessmen (the IFC defendants), *who never agreed to do anything illegal*, and who did not even *know* that their two other partners in the entirely legal venture (Diaco and Sutton) were contemplating an additional illegal means of securing the variances, would be criminally responsible for the illegal means employed by the two others, simply because the three businessmen had agreed with the two others to secure the variances by entirely lawful means. Petitioners submit that there is no principle of "agency" — or of any other branch of Anglo-American criminal law — that would hold these three businessmen vicariously liable for the illegal acts of the two others. The courts have unanimously held that when there is an agreement to achieve an entirely lawful end (here, the securing of variances) and when *some* of those entering into the agreement have decided among themselves to employ unlawful means (here, the bribing of Mayor Ross), the unlawful means may not be attributed to others without, at the very least, a specific instruction to the jury that it must find that the others *knew* that some of the group intended to use unlawful means. See, *e.g.*, *United States* v. *Spock*, 416 F. 2d 165 (1st Cir. 1969).

Since the court of appeals here concluded that on the record of this case the jury must be presumed to have found that the IFC defendants entered into an agreement *solely* to purchase Serota's apartment and *not* to bribe Mayor Ross, the government's "agency" argument simply cannot apply. When stripped of that argument, however, what is left of the government's position is simply its concession that the jury may well have found the IFC defendants guilty of count II exclusively on the basis of the trial court's instruction on vicarious lia-

bility — an instruction which presupposes guilt on the very conspiracy count which the court of appeals reversed. The logic of the government's own position thus supports the fundamental contention of the IFC defendants that the reversal and remand on count I compels the same result with respect to count II.

Moreover, the leading legal authority relied on by the government — *United States* v. *Alsondo*, 486 F. 2d 1339, 1346, 1347 (2d Cir. 1973) — also requires reversal of count II. In *Alsondo*, three defendants had been convicted for conspiracy to assault a federal narcotics agent and for the substantive offense of committing such an assault. Under the charge to the jury, two of the substantive convictions had been obtained under a theory of vicarious liability. On appeal, the conspiracy convictions were reversed on the ground that there was no proof that the defendants had agreed and conspired to commit an assault upon a *federal officer*. There was, however, ample evidence that all of the defendants had entered into a different *criminal* conspiracy — not the one charged — to assault or defraud a particular victim. Faced on rehearing with the question of whether to reverse the substantive convictions which had been obtained on the theory of vicarious liability, the court specifically found that in order to have rendered its (legally erroneous) verdict of guilty under the conspiracy count, "the jury must already have found an agreement — involving [all defendants] — to assault a victim (who turned out to be a federal officer) or to take money from him by fraud or force." 486 F. 2d at 1347. Accordingly, because there could be no question that the jury had found all defendants to have participated in a joint venture with an *illegal* purpose — even though not the precise one charged in the conspiracy count — the court declined to reverse the substantive convictions. The court stated, in words entirely supportive of the IFC defendants' position here:

> It is well established in this and other circuits that the admissibility of acts of *a joint criminal venturer against his partner in a crime* "rests on basic principles of agency and not on the presence of a conspiracy count."
>
> . . . . . .
>
> This finding of *criminal agreement* is sufficient, on general agency principles, to sustain defendants' liability for their co-conspirators' actions. . . . The jury's finding makes clear that [the defendants whose convictions were obtained under the vicarious liability theory] were part of a plot to commit the *crime* that actually occurred. On such facts, the finding of guilt as to each should stand. *Id.* at 1346, 1347 (emphasis added).

In the instant case, of course, the joint venture at issue — an entirely lawful venture to secure zoning variances by purchasing Serota's apartment — cannot be characterized as a "criminal agreement." Nor can the IFC defendants be characterized on the basis of their participation in that venture as "joint criminal venture[s]" or "partner[s] in crime." Indeed, under the court of appeals' decision, what must be presumed here — namely, that the IFC defendants entered into a *noncriminal agreement* to engage in a constitutionally protected and entirely lawful act — is precisely opposite from the finding of a joint *criminal* venture which undergirds the court's decision in *Alsondo*. Under the reasoning in *Alsondo*, the IFC defendants cannot be held vicariously liable under "basic principles of agency" for the unagreed-to criminal acts of a joint venturer who, without the knowledge of the IFC defendants, acted beyond the scope of the agreed-upon venture. Thus the *Alsondo* case — the authority most strongly relied upon by the government — not only offers no

support to the government's position; it directly supports the contentions of the IFC defendants and requires the reversal of their remaining conviction under count II.

Conclusion.

In the conclusion of their petition for certiorari, the IFC defendants requested that, if this Court decides against plenary review, it should, at the very least, remand the case to the Third Circuit for briefing and full argument on whether, in light of that court's reversal of the umbrella conspiracy count, a new trial is required on the remaining substantive count. Pet. 76-334, at 34. As the petition pointed out, petitioners were not able to present the instant argument to that court on the original appeal. Thus, if this Court denies review, this important issue will not have been considered or decided on the merits by *any court*. Now, an additional event has occurred that also was never considered by the court of appeals and that requires — at the very least — a remand to that court: the government has now in effect conceded — for the first time — that the decision of the court of appeals has created "an inconsistent verdict." Even if the government were correct that the creation of an inconsistent verdict by the court of appeals in this case does not warrant plenary review by this Court, that result surely *does* warrant — at the very least — reconsideration by the court of appeals. The court of appeals might very well conclude that it should not affirm a conviction which the government concedes has the effect of creating an inconsistency with that court's reversal of the other counts.

It remains the IFC defendants' basic contention, however, that this case is ideally suited for plenary review by this Court on the recurring and important issue presented in their petition for certiorari and in the instant reply.

Respectfully submitted,

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